Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 19____

B&M FARMS, KEVIN F. BREWER,
and JoANN BREWER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence of standard practice of mailing, without more, is sufficient to establish the "use of the mail" element of the mail fraud statute, 18 U.S.C. § 1341?

2. Whether the application of Standing Order 7 of the District Court to the facts of this case effectively denied the Petitioners their Constitutional Right to an impartial jury as guaranteed by the Sixth Amendment?

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COME NOW the Petitioners, B&M Farms, Kevin F. Brewer, and Jo Ann Brewer, and respectfully request that the Supreme Court of the United States issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

On June 21, 1996, the United States Court of Appeals for the Ninth Circuit issued its Memorandum in Cause Nos. 95-30118, 95-30134, 95-30119, 95-30133, 95-30144, and 95-30162. The Memorandum addressed the three appeals filed on behalf of each of the three Petitioners as well as the three cross-appeals filed by the United States of America. The Memorandum, a copy of which is set forth in the Appendix as Exhibit (A), affirmed the convictions of the three Petitioners, but vacated the sentences of Kevin F. Brewer and JoAnn Brewer and remanded for resentencing. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed on behalf of the Petitioners. By Order dated August 7, 1996, the Court denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. The Memorandum Opinion was not published.

BASIS FOR JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit in this case was entered on June 21, 1996. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was

denied and rejected by Order filed August 7, 1996. This Petition for Writ of Certiorari, which is sent to the Clerk through the United States Postal Service by First Class Mail, Postage Prepaid on September 19, 1996, is timely pursuant to Supreme Court Rule 13.1 and Supreme Court Rule 29.2.

The jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1254(1) to review on a Writ of Certiorari the Judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Sixth Amendment --

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C. § 1341:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both."

Standing Order 7 of the United States District Court for

the District of Montana:

> "The court, having determined the existence of an immediate need for an order amending the local rules of court pertaining to communications with trial jurors, enters the present order on an emergency basis under authority of 28 U.S.C. § 2071(e), until such time as the rule may be submitted for appropriate public comment.
>
> IT IS HEREBY ORDERED that the following rule of procedure shall take effect immediately:
>
> 1. **Before or During Trial.** Absent an order of the court, and except in the course of in-court proceedings, no one shall directly or indirectly communicate with or cause another to communicate with a juror or prospective juror or his family before or during a trial.
>
> 2. **After Trial.** Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the court written interrogatories

proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. *See*, Fed.R.Evid. 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.

3. Juror's Rights. Except in response to a court order, no juror is compelled to communicate with anyone concerning any trial in which the juror has been a participant."

STATEMENT OF THE CASE

A. Statement of the Facts

Kevin F. Brewer is a 61 year old farmer and rancher from Forsyth, Montana, where he has lived nearly his entire life. In 1955, Mr. Brewer married JoAnn Brewer, and they started raising a family which would eventually consist of three boys, Kevin M. Brewer, Steven Brewer, and Jason Brewer.

In 1985, Mr. Brewer discussed the possibility of forming a farming partnership with his oldest son, Kevin M. Brewer. On March 1, 1986, the Partnership Agreement of B&M Farms was signed, thereby creating the farming partnership of B&M Farms. The Agreement was signed by each of the five partners, namely Kevin F. Brewer, son Steven Brewer, son Kevin M. Brewer, and two close family friends and employees of the Brewer family, John MacLeod and Michael McLeod. Each partner was expected to contribute to the partnership their own area of expertise and knowledge.

Following the formation of the partnership, B&M Farms opened a separate checking account and established its own Federal Tax I.D. number. Suppliers of fuel and other agricultural products were notified of the formation of B&M Farms and asked to maintain a separate account for B&M Farms. Separate tax returns were also prepared for B&M Farms by the accountant. Finally, the two long time family friends and employees of the Brewer family, namely John MacLeod and Michael McLeod, no longer received paychecks from Kevin Brewer with the usual employee deductions, but rather now received partnership draws from the B&M Farms account with no such deductions. Finally, John MacLeod and Michael McLeod no longer received a W-2 Tax Form as they had prior to the formation of the partnership, but rather now received a K-1 Form which sets forth the income which they received from

the B&M Farms partnership.

Following the formation of the partnership, B&M Farms made application to the Agricultural Stabilization and Conservation Service (ASCS), an organization within the U.S.D.A. that administers federal farm programs, to participate in the Wheat and Feed Grain Program and the CRP Program. With respect to Crop Years 1986, 1987, and 1988, B&M Farms was approved by the County Committee of the ASCS. Following the withdrawal of son Kevin M. Brewer from the partnership, B&M Farms was again approved for Crop Year 1989.

Although B&M Farms received its usual payments for Crop Year 1990, B&M Farms was first disapproved by the County Committee, and then, following an appeal hearing, B&M Farms was approved for payments. Mr. Orville Seright, the District Director for ASCS, asked the State ASCS Committee to review the County Committee's approval. The State Committee finally approved B&M Farms for participation in the CRP Program, and denied a portion of the WFGP Program payments. B&M Farms then appealed the State Committee's decision to Washington, D.C. where it is still pending. Also in 1990, Michael McLeod left the partnership, and JoAnn Brewer became the fourth partner in B&M Farms. Finally, B&M Farms was approved for participation in both the programs for the years 1991, 1992, and 1993.

On April 21, 1994, an Indictment was filed in Cause No. CR 94-28-BLG-JDS, in the United States District Court for the District of Montana, Billings Division, charging B&M Farms, Kevin F. Brewer, and JoAnn Brewer, in Count I with the offense of Mail Fraud in violation of 18 U.S.C. § 1341; in Count II with the offense of False Statement in violation of 18 U.S.C. § 1001; and in Count III with the offense of False Statement in violation of 18 U.S.C. § 1001. From an overall point of view, the charges generally allege that B&M Farms was a sham partnership and that B&M Farms, Kevin F. Brewer, and JoAnn Brewer made false statements and presented false documents to the Department of Agriculture as part of their participation in the government programs.

On January 9, 1995, the jury trial began. During the trial, the only testimony presented by the Government concerning the issue of use of the mails was the testimony of one witness, namely Ms. Diane Wyrick, an employee with ASCS, who testified at page 351 of the transcript:

> "Q. Where do the checks come from that are paid out on these deficiency programs?
>
> A. Commodity Credit Corporation.
>
> Q. Are they sent out of some

office other than your own?

A. No. From ours.

Q. How are they sent out?

A. By mail."

On Tuesday, January 17, 1995, after one and one-half days of deliberation, the jury returned a verdict of "guilty" as to each of the three counts in regard to B&M Farms, Kevin F. Brewer, and JoAnn Brewer.

Following the jury trial, defense counsel was informed that a woman by the name of Ms. Linda Vannattan overheard a conversation in which the Brewer trial was discussed. Ms. Vannattan was contacted and she informed defense counsel that on Monday, January 16, 1995, at approximately 3:00 p.m., Ms. Vannattan and her husband were at a fast food restaurant located in Billings, Montana. While sitting inside the restaurant, Ms. Vannattan overheard a conversation involving a number of elderly men. The gist of the conversation appeared to center around statements made by a juror who was no longer on the jury, and the person repeated a statement allegedly made by the discharged juror, "He told me that they would not have convicted if I was on the jury."

As a result of the conversation, two items were

of importance. First, the only possible juror who was already discharged on Monday, January 16, 1995, was Mr. Robert Ludwick, the Alternate Juror who was released on Friday, January 13, 1995. Of even greater importance was the fact that the statement possibly attributed to Mr. Ludwick indicates that he was aware of the jury verdict on Monday, January 16, 1995, even though the verdict was not returned by the jury until Tuesday evening, January 17, 1995.

After being informed of the overheard conversation, defense counsel recalled that following the closing argument in the case and the discharge of the Alternate Juror, Mr. Ludwick attempted to speak to Mr. Michael G. Moses, one of the defense attorneys, while waiting for the elevator at the Federal Courthouse. Mr. Moses informed Mr. Ludwick that the attorneys were not able to speak to Mr. Ludwick at the time, and no further conversation was had with Mr. Ludwick.

As a result of the information obtained, defense counsel prepared a motion and a supporting affidavit pursuant to Standing Order 7 of the District Court of Montana. The affidavit of defense counsel set forth the relevant facts obtained, and the motion set forth the nature and scope of the juror interview. Specifically, the only juror which defense counsel requested to interview was the alternate juror, Mr. Ludwick, and the questions to be asked of Mr. Ludwick were limited to only three specific questions. By order dated February 24, 1995, United States District Judge Jack D.

Shanstrom denied the motion to communicate with the alternate juror stating, "the Court deems it not appropriate to communicate with the alternate juror."

B. Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the Court of First Instance, the United States District Court for the District of Montana, Billings Division, is the alleged violations of federal statutes, namely 18 U.S.C. § 1341 and 18 U.S.C. § 1001.

ARGUMENT

Questions Presented for Review

1. **Whether evidence of standard practice of mailing, without more, is sufficient to establish the "use of the mail" element of the mail fraud statute, 18 U.S.C. § 1341?**

The established elements of mail fraud as set forth in 18 U.S.C. § 1341 are as follows:

(1) Defendant was part of a scheme or plan for obtaining money or property by making false promises or statements;

(2) Defendant knew the promises or statements were false when made;

(3) The promises or statements were of a kind that would reasonably influence a person to part with money or property;

(4) The Defendant acted with the intent to defraud; and

(5) The Defendant used or caused to be used the mail to carry out or attempt to carry out the scheme.

In addressing the important jurisdictional element of "use of the mails", the United States Court of Appeals for the Ninth Circuit in its Memorandum opinion stated that a jury could conclude beyond a reasonable doubt that the Defendants knowingly maintained a fictitious partnership to defraud the Government of farm subsidies, and that in doing so Defendants caused the mails to be used. Specifically addressing the "use of the mails" evidence, the Court stated at Footnote 5, page 8:

> "Trial testimony proved that the A.S.C.S. mailed the farm program checks to recipients. With no evidence to the contrary, the jury could reasonably assume the A.S.C.S. had followed its usual practice."

As previously stated, the only evidence as to mailing

was the testimony of Ms. Diane Wyrick who testified that the checks "on these deficiency programs" are sent out by mail. Nevertheless, the Court found such meager evidence to be sufficient to satisfy the jurisdictional "use of the mails" element to be satisfied.

It is important to understand that the "use of the mails" element has two components. First, the mailing must be "in furtherance" of the scheme to defraud. See *Kann v. United States*, 323 U.S. 88, 95 (1944) where this court stated:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

Second, the Government must prove that the Defendant has mailed or has knowingly caused another to mail a letter or other matter for the purpose of executing the scheme. See *Pereira v. United States*, 347 U.S. 1, 8 (1954).

Although the Court failed to engage in any discussion whatsoever concerning the sufficiency of the evidence that the mailing being in furtherance of the scheme to defraud, the decision of the Court finding the evidence sufficient to satisfy the "use of the mails" element is in direct conflict with other decisions of the

Courts of Appeals.

Specifically, in *United States v. Burks*, 867 F.2d 795 (3rd Cir. 1989), the United States Court of Appeals for the Third Circuit specifically stated at page 797 of its opinion:

> "In support of its argument that the report was actually mailed, the government relies only upon circumstantial evidence concerning the standard business practice of Reed's office and the insurance company's usual experience of receiving such correspondence through the mail. No evidence was presented concerning the Reed correspondence specifically. Although the circumstantial evidence may be used to prove the element of mailing essential to conviction under § 1341, reliance upon inferences drawn from evidence of standard business practice without specific reference to the mailing in question is insufficient. `Proof of the use of the mails can ... be circumstantial, such as testimony regarding office practice, so long as the circumstances proven directly support the inference *and exclude* all reasonable doubt to the extent of overcoming the presumption of innocence.'"

In addition, in *United States v. Brooks*, 748 F.2d 1199 (7th Cir. 1984), a case relied upon in *Burks*, the United States Court of Appeals for the Seventh Circuit also held that proof of the use of the mails can also be circumstantial, such as testimony regarding office practice, so long as the circumstances proven directly support the inference and exclude all reasonable doubt to the extent of overcoming the presumption of innocence.

From the above described cases, it is clear that the evidence, viewed in the light most favorable to the Government, only established that the standard practice of the office of A.S.C.S. was to mail the farm program checks to the recipients. However, there was no evidence presented in this case with "specific reference" to the mailing in this case, specifically that the checks allegedly sent to Mr. and Mrs. Brewer and B&M Farms were in accordance with the standard office practice. More importantly, the evidence did not clearly "exclude all reasonable doubt to the extent of overcoming the presumption of innocence." In fact, rather than requiring the evidence to exclude all reasonable doubt to the extent of overcoming the presumption of innocence, the Court in this particular case appears to shift the burden of proof to the Defendant to generate evidence to the contrary and allows the jury to make assumptions by the Court stating:

> "With no evidence to the contrary, the jury could reasonably assume the A.S.C.S.

had followed its usual practice."

Such a decision not only shifts the burden of proof and allows unpermitted inferences to be drawn, but more importantly, the decision of the Court in this case is in direct conflict with decisions of the United States Court of Appeals for the Third Circuit and the Seventh Circuit in regard to this important jurisdictional issue. Nevertheless, evidence of standard office practice, without more, is insufficient to establish the "use of the mail" element of the mail fraud statute.

2. **Whether the application of Standing Order 7 of the District Court to the facts of this case effectively denied the Petitioners their Constitutional Right to an impartial jury as guaranteed by the Sixth Amendment?**

The Sixth Amendment to the Constitution of the United States guarantees all criminal defendants the right to an impartial jury. In addition, a criminal defendant has the right to be tried by a jury whose verdict is based solely on the evidence received by the jury in open court. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966). If there is a "reasonable possibility" that a jury's verdict has been affected by material not properly admitted as evidence, the criminal defendant is entitled to a new trial. See *United States v. Andrews*, 895 F.2d 406, 408 (7th Cir. 1990). In addition, the impartiality of the jury can be tainted, not only by their

consideration of evidence not properly admitted during the trial, but also by other influences. In *Parker v. Gladden*, 385 U.S. 363 (1966), the bailiff, who was assigned to *Sheppard* the sequestered jury, stated to some of the jurors that the defendant was guilty and that if there was anything wrong in finding the defendant guilty, the Supreme Court would correct it. This Honorable Court found that the statements of the bailiff to the jurors were controlled by the command of the Sixth Amendment which guarantees that the accused shall enjoy the right to a trial by an impartial jury, and reversed the verdict of guilty.

Finally, jurors may engage in misconduct in their failure to follow the Court's instructions. In *United States v. Carmona*, 858 F.2d 66 (2nd Cir. 1988), the United States Court of Appeals for the Second Circuit faced a situation in which it was disclosed that some of the jurors had discussed the case among themselves during trial. Defense counsel notified the Court of the alleged juror misconduct after the jury had returned its verdict, and the presiding Judge thereafter questioned each juror and found that some of them had indeed discussed various minor aspects of the trial, but the Court concluded that these discussions had not resulted in any prejudice against the defendants.

Each of the cases previously cited share at least one fact in common, namely a disclosure or discovery was made of the improper evidence or improper conduct. When the discoveries or disclosures were

brought to the attention of the Court by the defense attorney, they took the form of hearsay evidence. Obviously, the fact that the discovery or disclosures were made to the Court in the form of hearsay did not, by that fact alone, render the disclosures unworthy of further investigation.

However, before proceeding further, it is important to point out an important distinction. Often times, issues as to the quality and quantity of evidence arise in the context of whether an evidentiary hearing should be held as a result of the discovery or disclosures. Such was the case in *United States v. Easter*, 981 F.2d 1549 (10th Cir. 1992) where the Court stated at page 1553 of its opinion:

> "Although the ordinary course is to require a hearing or inquiry into nonfrivolous allegations of juror misconduct, *United States v. Ramsey*, 726 F.2d 601, 604 (10th Cir. 1984), such an inquiry is not warranted when only 'thin allegations of jury misconduct' are present. *United States v. Cattle King Packing Co.*, 793 F.2d 232, 243 (10th Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986)."

Here, on the other hand, the issue is not whether an evidentiary hearing should be held, but rather something far less -- whether an attorney can speak to

a single juror. The intrusiveness, not only into the juror's life, but also into the sanctity of the jury system, is far less than a full evidentiary hearing. It follows then that the quantum of proof necessary to permit the interview of a single juror should be far less than what is required for an evidentiary hearing.

Here, however, the United States Court of Appeals utilized a test which is appropriate in determining whether an evidentiary hearing is required. Specifically, the United States Court of Appeals utilized the test as set forth in *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991) where the Court stated:

> "Unless the Court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held."

In applying the test, the Court did find that the allegations, if true, would warrant a determination of whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial, citing *United States v. Klee*, 494 F.2d 394, 396 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974). Nevertheless, the Court then went on to state that the allegation made to the District Court was fifth-hand hearsay, and thus the allegation was so attenuated and lacking in credibility that the District Court did not

abuse its discretion in denying the motion.

Here, the allegations provided to the Court were in the form of an Affidavit of defense counsel. Further, the information contained in the Affidavit was information from Ms. Linda Vannattan who overheard a conversation discussing statements allegedly made by the alternate juror. As a consequence, such information would, at most, be considered third-hand hearsay.

When judging such evidence, the rule requires that the Court find that the allegations "are without credibility." Nevertheless, the Court in this case appears to make a de novo review of the allegations, and the Court finds the allegations lacking in credibility, presumably as a result of their removed hearsay nature. By doing so, the Court fails to recognize the fact that all such allegations as a result of the local rule will always be in the nature of hearsay allegations due to the fact that defense counsel is not permitted to speak with jurors without permission of the Court. To disregard such allegations because the allegations are hearsay only serves to completely insulate Montana juries from any scrutiny whatsoever. The end result is that Montana defendants are effectively denied their Constitutional Right to a fair and impartial jury by being, for all practical purposes, prevented from making any reasonable inquiry into allegations of juror misconduct.

Standing Rule 7 requires that the attorney must

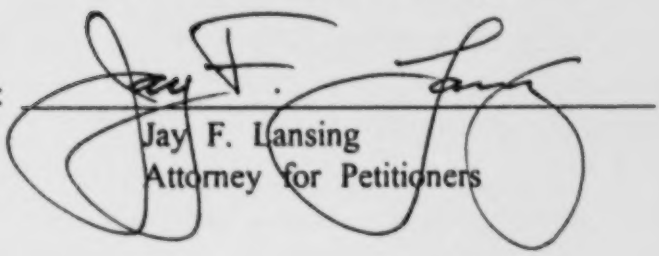
establish "good cause" for interviewing the discharged juror. Hearsay evidence cannot be excluded as a means of establishing "good cause." However, that is precisely what occurred in this particular case, and by so doing, the Petitioners were denied their only means in determining whether they were afforded their Constitution Right of being tried by an impartial jury. By being prevented from determining whether they, in fact, were granted or denied their Constitutional Right to an impartial jury, they were functionally and effectively denied that right. As a result, the application of Standing Rule 7 to the facts of this case effectively denied the Petitioners their right to an impartial jury as guaranteed by the Sixth Amendment.

CONCLUSION

For the reasons stated and the authorities cited, the Petitioners, B&M Farms, Kevin F. Brewer, and Jo Ann Brewer, respectfully request that this Honorable Court grant their Petition for Writ of Certiorari.

DATED this 19th day of September, 1996.

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